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U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090



**U.S. Citizenship
and Immigration
Services**

B5

[REDACTED]

Date:

MAY 30 2012

Office: NEBRASKA SERVICE CENTER

[REDACTED]

IN RE: Petitioner:
Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen with the field office or service center that originally decided your case by filing a Form I-290B, Notice of Appeal or Motion, with a fee of \$630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

A handwritten signature in black ink, appearing to read "Perry Rhew".

Perry Rhew
Chief, Administrative Appeals Office

DISCUSSION: The Director, Nebraska Service Center, denied the immigrant visa petition. The petitioner appealed this denial to the Administrative Appeals Office (AAO), and, on March 8, 2010, the AAO dismissed the appeal. Counsel filed a motion to reopen and a motion to reconsider (MTR) the AAO's decision in accordance with 8 C.F.R. § 103.5. The motion will be dismissed.

The petitioner is a software development and consulting company. It seeks to employ the beneficiary permanently in the United States as a software engineer. As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the United States Department of Labor (the DOL). The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly. The AAO affirmed this determination on appeal and also concluded that the petitioner failed to establish that the beneficiary had earned the required degree by the priority date.

In pertinent part, section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

In dismissing the appeal, the AAO noted that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition and that the beneficiary did not satisfy the minimum level of education stated on the labor certification. Therefore, the beneficiary cannot be found qualified for classification as a member of the professions holding an advanced degree.

On motion, counsel states that "[w]e believe that this decision was in error because from our net profits and our net current assets, there is sufficient funds to pay....the offered wage." Counsel further states that the beneficiary "does have a Masters degree" even though it was awarded after the priority date. Counsel requested "30 days to furnish details."

The regulation at 8 C.F.R. § 103.5(a)(3) states:

Requirements for motion to reconsider. A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or [U.S. Citizenship and Immigration Services (USCIS)] policy. A motion to reconsider a decision on an application or petition must, when filed, also establish that the decision was incorrect based on the evidence of record at the time of the initial decision.

As of this date, counsel did not submit any document that would meet the requirements of a motion to reconsider. Counsel does not state any reasons for reconsideration nor cite any precedent decisions in support of a motion to reconsider. Counsel does not argue that the previous decisions were based on an incorrect application of law or USCIS policy. Therefore, the motion does not meet the requirements for motions for reconsideration.

Furthermore, the AAO will dismiss the motion for failing to meet the applicable requirements for motions to reopen.

The regulation at 8 C.F.R. § 103.5(a)(2) states in pertinent part:

Requirements for motion to reopen. A motion to reopen must state the new facts to be provided in the reopened proceeding and be supported by affidavits or other documentary evidence. . . .

Based on the plain meaning of "new," a new fact is found to be evidence that was not available and could not have been discovered or presented in the previous proceeding.¹

The motion contains no facts that could be considered "new" under 8 C.F.R. § 103.5(a)(2). Therefore, the motion does not meet the applicable requirements of motions to reopen.

Motions for the reopening of immigration proceedings are disfavored for the same reasons as petitions for rehearing and motions for a new trial on the basis of newly discovered evidence. *INS v. Doherty*, 502 U.S. 314, 323 (1992)(citing *INS v. Abudu*, 485 U.S. 94 (1988)). A party seeking to reopen a proceeding bears a "heavy burden." *INS v. Abudu*, 485 U.S. at 110.

The record indicates that the AAO issued the decision on March 8, 2010. It is noted that the AAO properly gave notice to the petitioner that it had 30 days to file a motion. Neither the Act nor the pertinent regulations grant the AAO authority to extend this time limit.

Although counsel dated the Form I-290B April 7, 2010, it was not received by the service center until April 13, 2010, or 36 days after the decision was issued. Accordingly, the motion was untimely filed and must be dismissed for this additional reason. 8 C.F.R. § 103.5(a)(1)(i); 8 C.F.R. § 103.5(a)(4). It is noted that the record does not establish that the motion was filed late for a reason beyond the petitioner's control. See 8 C.F.R. § 103.5(a)(1)(i). Also, the erroneous filing of the motion directly with the AAO did not retain a filing date. 8 C.F.R. § 103.2.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not sustained that burden. Accordingly, the motion will be

¹ The word "new" is defined as "1. having existed or been made for only a short time . . . 3. Just discovered, found, or learned <new evidence>" WEBSTER'S NEW RIVERSIDE UNIVERSITY DICTIONARY 792 (1984) (emphasis in original).

dismissed, the proceedings will not be reopened or reconsidered, and the previous decisions of the director and the AAO will not be disturbed.

ORDER: The motion is dismissed.